86-327

No.

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY and JEWELL RIDGE COAL CORPORATION,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARK E. SOLOMONS
Counsel of Record
Arter & Hadden
Suite 400
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 775-7154

Counsel for Petitioners

Of Counsel:

MICHAEL F. BLAIR
P.O. Box 749
Abingdon, Virginia 24210

August 29, 1986

CASILLAS PRESS INC. – 1717 K STREET NW WASHINGTON DC 20036 – 223-1220

30 pp

QUESTIONS PRESENTED

The Fourth Circuit en banc has issued a decision which substantially revises the rules of evidence and procedure which have been applied for many years in hundreds of thousands of claims under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945.

The Court of Appeals held that black lung claimants seeking to obtain the great advantage of the key presumption of eligibility for benefits in 20 C.F.R. § 727.203 (1986) will do so as a matter of law by presentation of any supporting evidence whether or not such evidence is credible or reliable, or the fact to be found on the basis of it is supported by a preponderance of the relevant evidence.

The questions presented in this context are:

1. Does the Black Lung Benefits Act or any authority expressly supersede the preponderance rule and evidentiary standards of 5 U.S.C. § 556(d), within the meaning of 5 U.S.C. § 559?

2. Should the Court of Appeals have accorded substantial deference to the contemporaneous, consistent, and 14-year-long standing interpretation of the regulation by both the Secretary of Labor and the Secretary of Health and Human Services, and the reliance placed thereon by claim parties?

LIST OF PARTIES AND RULE 28.1 STATEMENT

This matter involves three separate claims for black lung benefits which were consolidated in the first instance by the Court of Appeals. The parties below and their respective postures in this petition are as follows: Glenn Cornett was a claimant/respondent below and his last employer, the Mullins Coal Company, Incorporated of Virginia ("Mullins") was the petitioner below. The Old Republic Insurance Company ("Old Republic"), also a petitioner below, is the black lung insurance carrier for Mullins. Luke Ray was the claimant/petitioner below and his last employer, the Jewell Ridge Coal Corporation ("Jewell Ridge"), was the respondent below. Gerald R. Stapleton was the claimant/petitioner below and his last employer, the Westmoreland Coal Company, was the respondent below. The Director, Office of Workers' Compensation Programs, United States Department of Labor, is the administrator of the Black Lung Program and was an intervenor in all three cases before the Court of Appeals. The Director, by delegation of authority from the Secretary of Labor, is a statutory party in all black lung claim proceedings, 30 U.S.C. § 932(k).

Mullins, Old Republic and Jewell Ridge are the petitioners herein and all other parties below are respondents.

Mullins and the Westmoreland Coal Company are wholly independent corporations without parent, subsidiary or other corporate relationships which must be listed under Rule 28.1. Old Republic is a wholly-owned subsidiary of the Old Republic International Corporation. Jewell Ridge is an inactive corporate entity, the assets of which are wholly-owned by the Pittston Companies.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Page

Statutes and Regulations

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY and JEWELL RIDGE COAL CORPORATION,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Mullins Coal Company, Incorporated of Virginia, Jewell Ridge Coal Corporation, and the Old Republic Insurance Company, respectfully ask that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 26, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals in *Stapleton v. Westmoreland Coal Co.* is reported at 785 F.2d 424 and is

reprinted in the Appendix (App. 1a). The order of the Court of Appeals denying rehearing is unpublished and is reprinted in the Appendix (App. 152a). In Cornett's claim, the order of the Benefits Review Board denying reconsideration (App. 135a), the decision and order of the Benefits Review Board (App. 138a) and the decision and order of the administrative law judge (App. 141a) are all unreported and are reprinted in the Appendix as noted. In Ray's claim, the decision and order of the Benefits Review Board (App. 118a) and the decision and order of the administrative law judge (App. 125a) are unreported and are reprinted in the Appendix as noted. In Stapleton's claim, the decision and order of the Benefits Review Board (App. 102a) and the decision and order of the administrative law judge (App. 106a) are unreported and are reprinted in the Appendix as noted.

JURISDICTION

The decision of the Court of Appeals was entered on February 26, 1986. A timely petition for rehearing was denied by Order entered on April 21, 1986. On July 8, 1986, the Chief Justice signed an order extending the time for filing this petition for a writ of certiorari to and including August 29, 1986 (App. 155a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

Jurisdiction was conferred on the Court of Appeals in each of the three cases by the filing of a timely petition for review of a decision and order of the Benefits Review Board, United States Department of Labor, in accordance with 33 U.S.C. § 921(c) as incorporated by reference into 30 U.S.C. § 932(a).

STATUTES AND REGULATIONS INVOLVED

The following statutes, regulations, and published regulatory materials are reprinted in the Appendix:

1. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (App. 166a).

2. Section 12 of the Administrative Procedure Act, 5 U.S.C. § 559 (App. 167a).

3. Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a) (App. 168a).

4. Section 19(d) of the Longshore Act, 33 U.S.C. § 919(d) (App. 169a).

5. 20 C.F.R. § 727.203 (1986), 43 Fed. Reg. 36825-36826 (Aug. 18, 1978) (App. 156a).

6. Published Commentary on 20 C.F.R. § 727.203, 43 Fed. Reg. 36826 (Aug. 18, 1978) (App. 158a).

7. 20 C.F.R. § 410.490 (1972) (App. 163a)

STATEMENT OF THE CASE

A. Background

The Black Lung Benefits Act, 30 U.S.C. §§ 901-945,[1] provides for the payment of workers' compensation benefits on account of total disability or death due to coal workers' pneumoconiosis, which is variously called black lung disease or simply pneumoconiosis. Pneumoconiosis is

[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Amendments of 1981 and the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635.

a disease of the lung, which may be caused in coal miners by the inhalation of coal dust (30 U.S.C. § 902(b)). The coal mine operator which last employed the miner, or its insurance carrier, may be liable for the payment of benefits to an eligible claimant on a claim filed after June 30, 1973.[2] 30 U.S.C. §§ 925(a), 932(b), 933, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).[3]

Claims after June 30, 1973 are filed with the Secretary of Labor. Claims are processed and adjudicated in accordance with procedures set forth in the Longshore Act, 33 U.S.C. §§ 901 *et seq.*, which are incorporated by reference into the Black Lung Benefits Act, 30 U.S.C. § 932(a).

These procedures contemplate an informal adjudication by the Labor Department, 33 U.S.C. § 919(a)-(c). If that effort fails, there is a hearing *de novo* on the record before an administrative law judge (ALJ), 5 U.S.C. § 554 (incorporated by reference into 33 U.S.C. § 919(d)). A party dissatisfied with the ALJ's decision may appeal to the Benefits Review Board. A further appeal as a matter of right is available to the court of appeals for the circuit in which the injury occurred. 33 U.S.C. § 921(c). The court of appeals, like the Board, reviews the ALJ's decision to determine whether it is supported by substantial evidence

[2]Generally, claims filed prior to July 1, 1973, were filed with, adjudicated and paid by the Social Security Administration, 30 U.S.C. §§ 921-924. Claims filed after June 30, 1973, in which the miner was last employed in coal mining prior to January 1, 1970, or in which no coal mine operator or insurer is identified, are paid by the Black Lung Disability Trust Fund, 30 U.S.C. § 934. The Trust is funded by a producer tax, 26 U.S.C. §§ 4121, 9501.

[3]The Black Lung Benefits Act has changed substantially since its review by the Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976).

and in compliance with law, *See Old Ben Coal Co. v. Prewitt*, 755 F.2d 588, 589-90 (7th Cir. 1985).

Prior to appellate review, the parties are permitted to submit evidence in support of or in opposition to a claimant's assertion of entitlement. If medical issues are present, the parties will submit a variety of medical evidence.[4] Medical evidence is frequently dispositive and often in sharp conflict.

Certain medical evidence standing by itself may, by invoking a presumption of eligibility, serve to relieve the claimant of the burden of proving any other fact. Once the presumption invocation fact is proven, all ultimate facts necessary for entitlement are presumed.

The presumption in question is called the "interim presumption." In 1972, the Social Security Administration first adopted an "interim presumption" by regulation to be applied in its black lung claims, 20 C.F.R. § 410.490 (App. 163a). This regulation was not applicable to claims filed with the Labor Department, 20 C.F.R. Part 718.2 (1972), 37 Fed. Reg. 20615 (Sept. 30, 1972).

In amending the Act in 1977, Congress directed the Labor Secretary to develop new medical criteria for claims adjudications, but pending the development and issuance of these new criteria, the Labor Department was to adopt an "interim presumption" of its own which could "not be more restrictive than criteria applicable to a claim filed on June 30, 1973 . . . ." 30 U.S.C. § 902(f)(2). The Conference Committee cautioned the Secretary of Labor "in determining claims under such criteria, all relevant

[4]20 C.F.R. Part 718, Subpart B and Appendices A, B and C describe the nature of this evidence in detail.

medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register . . . ." H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978).

The Labor "interim presumption" was publishe August 18, 1978 at 20 C.F.R. § 727.203 (App. 156a). It is applicable in hundreds of thousands of claims, 30 U.S.C. § 945, 20 C.F.R. §§ 727.106-107.

B. The Instant Claims

The Labor interim presumption was applicable in all three cases, and all three were transferred to an ALJ for a hearing on the record and decision.

STAPLETON. In Stapleton's case, the record contained three chest x-ray reports, one of which found pneumoconiosis and two of which negated the presence of the disease. The ALJ found invocation of the Labor presumption on the basis of the single positive x-ray (App. 113a) 20 C.F.R. § 727.203(a)(1). The negative findings were not reviewed. The ALJ then found the presumption rebutted on several grounds and denied the claim. In so doing, the ALJ weighed the negative x-rays in his rebuttal inquiry.

Stapleton appealed to the Board. The Government argued in response that the presumption should not have been invoked because the ALJ found the preponderance of the x-ray evidence to be negative, albeit in his rebuttal inquiry. The Department reiterated its longstanding position that invocation by any method could be accomplished only after all relevant like-kind invocation evidence is weighed and the ALJ determines which of the reports are most reliable and credible.

The Board agreed with the Department and reversed the finding of x-ray invocation of the presumption but affirmed the denial of the claim as the ALJ's error was harmless (App. 104a).

Stapleton appealed to the Fourth Circuit arguing that the ALJ's invocation finding was correct but that the rebuttal finding was contrary to the Fourth Circuit's decision in *Hampton v. Benefits Review Board*, 678 F.2d 506 (4th Cir. 1982). *Hampton* held that otherwise reliable and credible medical opinion evidence, predicated in part on a physician's interpretation of objective pulmonary system test results, was incompetent rebuttal evidence as a matter of law. *See* note 8 *infra*.

RAY: Ray's case presents a variety of medical test results. The ALJ weighed the conflicting evidence in each invocation category. Finding that the weight of like-kind evidence in each category failed to establish any invoking fact by a preponderance, the ALJ denied access to the presumption and denied the claim (App. 133a).

On appeal, the Board found the ALJ's invocation fact determinations to have been supported by substantial evidence and affirmed (App. 124a). Ray appealed to the Fourth Circuit.

CORNETT:[5] Cornett's file also presented a variety of medical test evidence. The ALJ rejected each item not supporting invocation. The presumption was invoked (App. 146a). The ALJ found rebuttal evidence to be insufficient (App. 150a) and awarded benefits and prejudgment interest to Cornett.[6]

---

[5]Cornett died on June 27, 1983 from arteriosclerosis. The entitlement of his surviving spouse continues on the basis of his claim, 30 U.S.C. § 932*(l)*.

[6]The award of prejudgment interest was also appealed to the Board and the Court of Appeals. The Court of Appeals en banc considered the question and unanimously reversed (App. 29a).

On appeal to the Board, Mullins argued that the ALJ did not weigh the evidence in the invocation inquiry, but simply rejected evidence unfavorable to Cornett for a variety of improper reasons. The Board affirmed per curiam (App. 138a) and denied Mullins' Motion for Reconsideration (App. 135a).

Mullins appealed to the Fourth Circuit. It argued that on invocation the ALJ had so inaccurately and irrationally reviewed the relevant evidence that the effect of the decisional process was to excuse the claimant from his burden of proving the veracity of an invocation fact by a preponderance of the evidence, as required by 5 U.S.C. § 556(d) and the Fourth Circuit's own holding in *Consolidation Coal Co. v. Sanati,* 713 F.2d 480, 484 (4th Cir. 1983), which adopted a preponderance standard for the consideration of invocation evidence.

C. Fourth Circuit Proceedings

On February 11, 1985, the Court of Appeals *on its own motion* consolidated the three cases for en banc review.[7] It certified questions to be addressed by the parties, which are summarized as follows:

1. Whether any single item of evidence invokes the presumption, notwithstanding the presence in the record of equally probative or more probative like-kind evidence?

2. Whether and to what extent medical test evidence of the sort which might be considered on invocation, i.e., objective test results, may be relied upon to support a rebuttal finding?

[7]A fourth case, *Left Fork Coal Co. v. Cole,* No. 84-1832 (4th Cir. 1986), was removed from the group at the request of counsel.

The Appeals Court directed the parties to address these matters in light of its holdings in *Hampton v. Benefits Review Board,* 678 F.2d 506, *Consolidation Coal Co. v. Sanati,* 713 F.2d 480, and *Whicker v. Benefits Review Board,* 733 F.2d 346 (4th Cir. 1984), which modified *Hampton.*

The Government intervened in all three cases to address these critical issues in black lung litigation. The Government argued that all invocation and rebuttal facts were to be resolved in light of all relevant and material evidence, and that each party seeking to prove any fact bore the burden of doing so by a preponderance of the evidence. The Government claimed deference for its interpretation of its regulation.

The purpose of the extraordinary procedure was, apparently, to afford the Fourth Circuit en banc an opportunity to review the rules of proof and evidence it would apply in Labor Department interim presumption claims.[8] No congressional or agency action prompted this effort.

On February 26, 1986, the Court issued its decision accompanied by four separate concurring and dissenting opinions. *Hampton, Whicker* and *Sanati* were overruled (App. 4a). One 7-4 majority held in summary:

> That the interim presumption is invoked on the presentation of any single item of invoking evi-

[8]The proceeding in the Court of Appeals marks the culmination of the Fourth Circuit's effort to arrive at a *rebuttal* rule for black lung presumptions. *See, e.g., Whicker v. Benefits Review Board,* 733 F.2d 346; *Hampton v. Benefits Review Board,* 678 F.2d 506. Invocation rules of proof had not previously been troublesome in the Fourth Circuit, and the Court had, in both Labor Department claims (*Consolidation Coal Co. v. Sanati,* 713 F.2d 480) and Social Secruity black lung claims (*Sharpless v. Califano,* 585 F.2d 664 (4th Cir. 1978), consistently applied a preponderance standard in invocation determinations.

> dence. Evidence unfavorable to the claimant is not weighed in the invocation inquiry. The preponderance rule does not apply.

A differently constituted 7-4 majority held in summary:

> All relevant evidence is considered and weighed in the rebuttal phase.

The denial of benefits to Stapleton was affirmed as the rebuttal finding of the ALJ was in accord with these holdings. The denial of Ray's claim was vacated and remanded as there were single items of invoking evidence in the record. The award in Cornett was affirmed as the single items of invoking evidence need not have been weighed under the Court's holding.

On the invocation question, not only is the result in conflict with other circuits and the views of the federal agencies which have responsibility for administering these claims, but the seven-judge majority in three separate opinions disagreed on the rationale for its unique holding.

A petition for rehearing on the invocation question only, filed by Mullins, Old Republic, and Jewell Ridge, was denied by a 6-4 majority of the Court of Appeals on April 21, 1986 (App. 152a). On the same date, a petition for rehearing filed by Stapleton on various factual aspects of his claim was unanimously denied (App. 154a).

REASONS FOR GRANTING THE WRIT

The Labor Department's interim presumption is key to establishing a claimant's entitlement to benefits in hundreds of thousands of cases. The Fourth Circuit's unique holding has, in effect, made the invocation of this presumption an *ex parte* phase of the proceeding. This holding conflicts with the meaning of Sections 7(c) and 12 of

the Administrative Procedure Act ("APA") and establishes a precedent which undermines the purpose of these provisions. It conflicts directly with decisions of the Sixth Circuit and in principle with decisions of this Court, the circuits, and the district courts. It will disrupt the ongoing litigation of thousands of claims and is likely to have enormous economic consequences for coal mine operators, their insurers, and the solvency of the Black Lung Disability Trust Fund. The rule adopted by the Court of Appeals is neither authorized by Congress nor justified by any source of law.

I. THERE IS A CLEAR CONFLICT IN THE CIRCUITS

After *Stapleton,* the Sixth Circuit in *Back v. Director, OWCP,* ____ F.2d ____, No. 85-3466 (6th Cir. July 15, 1986), expressly rejected the "any evidence" invocation rule of *Stapleton.*[9] The Sixth Circuit has further held that "the miner has the burden of establishing by a preponderance of the evidence all the facts necessary to invoke the interim presumption . . . ." *Engle v. Director, OWCP,* 792 F.2d 63, 64 n.1 (6th Cir. 1986).

Prior to *Stapleton,* the preinvocation weighing of relevant evidence and application of a preponderance standard to conflicting invocation evidence were uniformly accepted practices which rarely captured the attention of the circuits. *See Consolidation Coal Co. v. Chubb,* 741 F.2d 968, 973 (7th Cir. 1984); *Markus v. Old Ben Coal Co.,* 712 F.2d 322, 326-27 (7th Cir. 1983). *See also Evosevich v. Consolidation Coal Co.,* 789 F.2d 1021, 1023 (3d Cir. 1986).

---

[9][T]his Court has rejected the plurality view of the Fourth Circuit in *Stapleton v. Westmoreland Coal Co.* . . . ." Slip op. at 7.

The circuit courts which have decided cases under the Social Security Administration's version of the interim presumption, 20 C.F.R. § 410.490 (App. 163a), acted similarly. The statutory connection between the two presumptions is clear (30 U.S.C. § 902(f)(2)) and the invocation language of the two is, for these purposes, identical.[10] In SSA cases, the circuits, including the Fourth Circuit, uniformly held that invocation may not be accomplished without a weighing of the like-kind evidence and a determination that an invocation fact is established by a preponderance. *See, e.g., Elkins v. Secretary of HHS,* 658 F.2d 437, 439 (6th Cir. 1981); *Vintson v. Califano,* 592 F.2d 1353, 1356-58 (5th Cir. 1979); *Sharpless v. Califano,* 585 F.2d at 666. A multitude of district court decisions dating to 1974 are in accord.

The Labor and SSA versions are *in pari materia,* and for these purposes, the SSA decisions cited are indistinguishable.

This Court's supervisory powers should be exercised to restore consistency in black lung claim litigation and to eliminate the confusion produced by the Fourth Circuit's holding.

[10]The alternative methods for invocation offered in the Labor version were not available under the Social Security version. (*Compare* App. 157a *with* App. 164a.)

II. THE DECISION RAISES IMPORTANT QUESTIONS CONCERNING THE ADMINISTRATIVE PROCEDURE ACT'S RULE AGAINST SUPERSEDURE AND A PARTY'S RIGHT TO RESPOND TO EVIDENCE IN AN APA PROCEEDING UNDER THE BLACK LUNG BENEFITS ACT

The applicability of the "on the record" hearing provisions of the Administrative Procedure Act ("APA") in claims is not in dispute. 33 U.S.C. § 919(d). This Court has repeatedly held that the procedural safeguards of the APA may not be abrogated in keeping with the express language of Section 12 of the APA, 5 U.S.C. § 559, by courts or agencies, absent clear language or supersedure. *Rusk v. Cort,* 369 U.S. 367, 379 (1962); *Brownell v. We Shung,* 352 U.S. 180, 185 (1956); *Wong Yang Sung v. McGrath,* 339 U.S. 33, 47-52 (1950). The framers of the APA plainly so intended. *Legislative History of the Administrative Procedure Act,* 79th Cong., 2d Sess. 414 (1946) (Appendix to the Attorney General's Statement). More recently, the circuit courts have continued this strict construction of 5 U.S.C. § 559.[11] Section 12 also provides "privileges relating to evidence and procedure apply equally to agencies and persons . . . ."

Section 7(c) of the APA, 5 U.S.C. § 556(d), imposes a preponderance of the evidence burden of proof on the proponent of a rule, order or sanction. *Steadman v. Securities and Exchange Commission,* 450 U.S. 91, 100-01 (1981). Similarly, no rule, order or sanction may issue except on consideration of the whole record and unless it is

[11]*See Gott v. Walters,* 756 F.2d 902, 913 n.11 (D.C. Cir. 1985); *Association of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System,* 745 F.2d 677, 686 (D.C. Cir. 1984); *Steere Tank Lines, Inc. v. ICC,* 714 F.2d 1300, 1310 (5th Cir. 1983).

"supported by and in accordance with the reliable, pro bative and substantial evidence." 5 U.S.C. § 556(d). The terms "rule," "order" and "sanction" are defined in 5 U.S.C. § 551(4), (6) and (10) to include all or part of an agency action. *See also* 5 U.S.C. § 551(7), (11) and (13). Senator McCarran, a sponsor of the APA, noted that the "any evidence" approach to fact-finding previously employed by agencies and by courts in the review of administrative decisions was no longer acceptable. 92 Cong. Rec. 2148, 2157 n.7 (Mar. 12, 1946).

The black lung claimant is indisputably the proponent of invocation of the presumption and invocation plainly imposes a significant sanction on claim defendants. *See* text at 15-16 *infra*.

The Fourth Circuit has now held that, whenever the record presents any evidence of invocation, the presumption is invoked notwithstanding the presence of more credible, more reliable or more substantial evidence which proves that invocation should not occur. The preponderance standard simply no longer applies. Rules of evidence and procedure are not applied equally. There is no effective right of cross-examination in the invocation phase. By this ruling, the Fourth Circuit has created a phenomenon which, petitioners believe, is unknown in federal civil litigation in the United States – an offer of proof of material fact which cannot be refuted, must be accepted by the trier of fact and is not, in effect, subject to appellate review. Indeed, a circuit court's statutory jurisdiction to conduct a substantial evidence review of all findings of fact presented on appeal, 33 U.S.C. § 921(c), is ousted with respect to invocation facts by *Stapleton*. *See Steadman v. Securities and Exchange Commission*, 450 U.S. at 96 n.13.

There is no express reference or supersedure or clear and convincing evidence of congressional intent which may even arguably be said expressly to override the preponderance rule. The Fourth Circuit's reliance for this purpose on the actions of congressional staff (App. 63a, 66a, 73a, 81a), the liberal intent of individual legislators (App. 75a, 82a), a law review article (App. 76a-81a) and ambiguous commentary published in the Federal Register (App. 94a-96a) which is not a part of any regulation, is not consistent with either the language or purpose of 5 U.S.C. § 559. The Fourth Circuit's rule departs substantially from the meaning accorded 5 U.S.C. § 559 by this Court and, in so doing, diminishes the procedural rights conferred by the APA to the detriment of claim defendants only. This is a matter worthy of this Court's attention.

The Fourth Circuit's application of its rule to intermediate fact-finding only lends little support to the holding. The interim presumption, like the presumption reviewed by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), is easy to invoke and quite difficult to rebut. *See, e.g., Wilson v. Benefits Review Board*, 748 F.2d 198 (4th Cir. 1984); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123 (4th Cir. 1984) (rebuttal proof must "rule out" presumed facts). (*See* App. 23a.) The facts which support invocation are not the same as the factual circumstances which must be addressed on rebuttal (App. 156a-158a). Proof of the intermediate facts necessary to invoke the interim presumption sharpens the inquiry on the ultimate facts which define entitlement in the rebuttal phase. But unlike the setting in *Burdine*, after invocation of the interim presumption, the ultimate burden of persuasion shifts to and stays with the claim defendant. *See, e.g., Amax Coal Co. v. Director, OWCP*, 772 F.2d 304, 305 (7th Cir. 1985) (and cases cited therein).

Thus, the interim presumption serves not only to establish a prima facie case within the context of a legally mandated presumption, *Burdine*, 450 U.S. at 1094 n.7, but it goes on to permanently allocate the burdens of proof and persuasion to claim defendants.

There is no indication anywhere of agency or congressional intent to impose this substantial burden by pretext or by insubstantial or unreliable evidence. Where intermediate fact-finding may so benefit the proponent that he is excused from carrying any proof burden and, in turn, imposes so significant a sanction on the defending party, fairness requires that traditional procedures be employed to ensure that the intermediate fact is supported by the record. Sections 7(c) and 12 of the APA were designed and intended to guarantee this result. *See also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613-14 nn.6-7 (1982). This Court sustained the validity of the statutory black lung presumptions in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27-37 (1976), in large part because their structure preserved the claim defendant's rights to answer evidence in all respects. A like result is surely proper under the interim presumption.

Most importantly, for almost 14 years in approximately 800,000[12] claims the two agencies which drafted and administered the presumption applied its invocation provision under a preponderance of the evidence rule, actively advocated this standard in the courts, and gained its acceptance. Through the course of innumerable congressional hearings and five major amendatory enactments from 1972-1981, the Government was not instructed to act otherwise. The Act itself provides:

> In determining the validity of claims under this part, all relevant evidence shall be considered, . . . *where relevant* . . . .

30 U.S.C. § 923(b) (emphasis added).

The regulation is compatible by requiring that an invoking fact be "established," 20 C.F.R. § 727.203(a), and by requiring consideration of all relevant medical evidence in the entire "subpart" in which § 727.203 appears, 20 C.F.R. § 727.203(b). The Labor Department's consistent interpretation of its longstanding and well-known evidentiary rule on which claim parties have relied for many years is justified and deserves vindication by this Court. *See N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 402 (1983).

III. THE HOLDING WILL HAVE A DECISIVE IMPACT ON THOUSANDS OF CLAIMS IN THE FOURTH CIRCUIT

The interim presumption is, as its name implies, not a permanent rule. It has expired for new claims filed on or after April 1, 1980, 20 C.F.R. §§ 718.1, 718.2. Many thousands of interim presumption claims, however, remain in administrative litigation. In fact, no claim involving the eligibility rules applicable after March 31, 1980 has reached a circuit court.

Unpublished caseload reports prepared by the Benefits Review Board and the Department of Labor's Office of Administrative Law Judges show that, as of July 31, 1986,

[12] *See: Hearings on Problems Relating to the Insolvency of the Black Lung Disability Trust Fund Before the Subcomm. on Oversight of the House Comm. on Ways and Means. Serial 97-32, 97th Cong., 1st Sess. 3, 17, 81-109 (testimony of Morton Henig, U.S. General Accounting Office; testimony of Sam Church, United Mine Workers of America).*

there are 5,482 pending cases before the Board[13] and 20,247 pending claims before ALJs. An additional volume of interim presumption claims, probably numbering in the thousands, remains in the Labor Department. Counsel's review of hundreds of Old Republic's individual claims pending at the Board reveals that approximately 86.5% are subject to the interim presumption and that approximately 13.3% of those are appeals by claimants from benefit denials in which the presumption was not invoked because the preponderance of the evidence failed to establish invocation. In all of these, the majority rule of *Stapleton* would require reversal or remand for a new trial if they arose in the Fourth Circuit. The Board has reported the identification of at least 110 claims arising in the Fourth Circuit clearly requiring remand or retrial and there are surely many more to follow. The Fourth Circuit has thus far remanded at least five claims from its own inventory. *See, e.g., Haynes v. Jewell Ridge Coal Corp.*, 790 F.2d 1113 (4th Cir. 1986); *Lagamba v. Consolidation Coal Co.*, 787 F.2d 172 (4th Cir. 1986).[14] It is believed that many, probably the majority, of the claims pending before ALJs also involve the interim presumption.

[13]The huge backlog of pending Board claims, the vast majority of which are black lung cases, prompted Congress to increase the size of the Board from 3 to 5 permanent and 4 temporary members in 1984. H.R. Rep. No. 1027, 98th Cong., 2d Sess. 33-34 (1984). The huge ALJ backlog prompted a special appropriation of funds to the Office of Administrative Law Judges in 1985.

[14]The Department of Labor has an inventory of from 50,000 to 100,000 denied interim presumption claims which are inactive. *Stapleton* would provide sufficient cause for reactivation in some of these under 33 U.S.C. § 922, as incorporated by reference into 30 U.S.C. § 932(a), and this Court's decision in *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

It is of no less concern from an insurance carrier's or mine operator's point of view that in reasonable reliance on the longstanding application of the preponderance rule in the invocation phase, many claims were defended primarily with a view toward proving noninvocation of the presumption. Proof of noninvocation typically cannot be relied upon to prove ultimate rebuttal facts. For this reason, in cases arising within the jurisdiction of the Fourth Circuit, a claim defendant's expectation that the existing record will be adequate for the defense of the claim after closure of the record or on appeal will most often be unjustified and thousands of claims already successfully defended are in jeopardy of reversal.

The average cost of a single black lung claim has been estimated by the Department of Labor to range from $118,315.88 in the case of an unmarried miner to $185,656.69 in the case of a married miner. U.S. Department of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act*, 32 (1981).

The Fourth Circuit's decision will, without question, produce a significant volume of relitigation. The re-invention of the most commonly applied eligiblity provision of the Black Lung Benefits Act will, of necessity, cause confusion in the claims litigation process in the Fourth Circuit and elsewhere, which may be avoided through an exercise of this Court's powers of supervision.

In enacting the Black Lung Benefits Act, Congress intended to establish a process by which hundreds of thousands of miners could assert their claims and mine owners and their insurers would have a fair opportunity to defend questionable claims. As frequent amendatory activity demonstrates, the integrity of this program is of great importance to Congress. For many years, federal courts and

administrative agencies have agreed upon the evidentiary standards applicable to key medical presumptions. The Fourth Circuit has strayed from this steady course. Thousands of claims and hundreds of millions of dollars are at stake. Miners and employers in Virginia or West Virginia should not, at this late date, face a different claims process than miners and employers in Ohio or Kentucky.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK E. SOLOMONS
Arter & Hadden
Suite 400
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 775-7154

Of Counsel:

MICHAEL F. BLAIR
P.O. Box 749
Abingdon, Virginia 24210

Dated: August 29, 1986